No. 75-1142

Supreme Court, U. S.
FILED
FEB 12 1976
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1975

---

**MARY MULLIGAN**, an individual, et al.,
*Petitioners,*

vs.

**GEORGE W. DUNNE**, et al.,
*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

---

PATRICK W. O'BRIEN
WAYNE W. WHALEN
STEVEN M. RASHER
THADDEUS J. MARCINIAK
231 South La Salle Street
Chicago, Illinois 60604
*Attorneys for Petitioners*

*Of Counsel:*
LOUIS L. BIRO
221 N. LaSalle Street
Chicago, Illinois 60601

ROBERT G. PRESSMAN
188 W. Randolph Street
Chicago, Illinois 60601

MORTON SIEGEL
189 W. Madison Street
Chicago, Illinois 60602

MAYER, BROWN & PLATT
231 S. LaSalle Street
Chicago, Illinois 60604

SORG/CHICAGO U.S.A.

# In the
# Supreme Court of the United States

OCTOBER TERM, 1975

---

## NO.

---

**MARY MULLIGAN**, an individual, et al.,

*Petitioners,*

vs.

**GEORGE W. DUNNE**, et al.,

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

---

Petitioners, Mary Mulligan, et al., Appellants in the Court below, pray that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Illinois entered in this case.

## OPINION BELOW

The opinion of the Supreme Court of Illinois, reported at 61 Ill. 2d 544, 338 N.E.2d 6 (1975), is appended as Appendix A. (App. 1-15.)

## JURISDICTION

The opinion and judgment of the Supreme Court of Illinois were entered on September 26, 1975 and a petition for rehearing was denied on November 21, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

Section 6(a) of Article VII of the Illinois Constitution of 1970 provides that voters in all Illinois counties except Cook County may elect whether or not to have home rule status, which status grants counties well nigh unlimited powers to tax, to incur debt, and to regulate the public health, safety and morals. Cook County is automatically made a home rule unit, thereby denying such a right to vote to its citizens.

The question presented is whether this discrimination against the voters of Cook County violates their right to vote as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."



## STATEMENT

This case arises from the enactment of a liquor tax ordinance by the Board of Commissioners of Cook County, Illinois on May 5, 1975 under its claimed home rule powers. In this case, the Cook County liquor taxing ordinance could not have been imposed unless Cook County was a home rule unit. (Appendix A at pp. 3-7).

The constitutionality of the tax was challenged in the Circuit Court of Cook County, Illinois by petitioners who are judicially certified classes. One class consists of residents, taxpayers and registered voters of Cook County who purchase and desire to purchase alcoholic beverages at retail within Cook County. Other classes include members of the alcoholic beverage industry from throughout the State of Illinois including distillers, vinters, brewers, distributors and retail dealers. Respondents are the Cook County taxing officials including George W. Dunne, President of the Cook County Board of Commissioners.

The 1970 Illinois Constitution mandated that Cook County, Illinois would be a home rule unit but permitted the voters in the other 101 Illinois counties to determine by referendum whether their counties would become home rule units. 1970 Ill. Const. Art. VII, § 6(a). The home rule powers and limitations as prescribed by the 1970 Illinois Constitution are set forth in Appendix B.

Home rule status gives Cook County general governmental powers unavailable to a non home rule county including almost unlimited power to tax, to incur debt and to regulate the public health, safety and morals. 1970 Ill. Const. Art. VII, § 6(a). Moreover, the Illinois Supreme Court has consistently held that exercises of home rule powers supersede existing Illinois state law on the subject insofar as the home rule unit is concerned. See, e.g., *Kan-*

*ellos* v. *County of Cook*, 53 Ill. 2d 161, 290 N.E.2d 240 (1972); *People ex rel. Hanrahan* v. *Beck*, 54 Ill. 2d 561, 301 N.E.2d 281 (1973). Since the new Constitution reqquires an extraordinary majority of three-fifths of the Illinois General Assembly to pass laws overturning, *inter alia*, home rule powers to tax, Cook County officials possess virtually unfettered power. 1970 Ill. Const. Art. VII § 6.

Home rule status for Cook County has resulted in a drastic increase in the powers of the County over Cook County residents and without their having a right to vote on this issue. Since the effective date of the 1970 Illinois Constitution the voters of eight other Illinois counties have considered adopting home rule status for their counties and in all eight counties they overwhelmingly rejected it.



## REASONS FOR GRANTING THE WRIT

### THE DECISION BELOW RAISES A SUBSTANTIAL FEDERAL QUESTION AND IS IN CONFLICT WITH THE RATIONALE OF THE DECISIONS OF THIS COURT.

The opinion below is inconsistent with this Court's interpretation of the Constitution. This Court has consistently held that in cases involving a fundamental right such as the franchise:

> "[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Kramer* v. *Union Free School District*, 395 U.S. 621, 627 (1969).

See also *Dunn* v. *Blumstein*, 405 U.S. 330, 337 (1972). In *Hill* v. *Stone*, 421 U.S. 289, 297 (1975), this Court reiterated the standard enunciated in *Kramer:*

> "The basic principle expressed in these cases is that so long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest. See *Kramer, supra*, 395 U.S., at 626, 627, 89 S.Ct. at 1889; *Cipriano, supra*, 395 U.S., at 704, 89 S.Ct. 1899."

Respondents have never attempted to demonstrate a compelling state interest for denying Cook County voters the franchise while granting it to the Illinois voters outside Cook County. The Court below did not deal with what, if

any, "compelling state interest" is served by the Ordinance (indeed the phrase "compelling state interest" does not appear in its Opinion*) and appears to have based its decision on the population and industrial concentration in Cook County in contrast to the other 101 Illinois counties. (Appendix A at 12.) Such a basis for distinguishing Cook from other Illinois counties, while perhaps appropriate when suspect classifications or fundamental rights are not involved, does not rise to the level of a compelling state interest so as to justify depriving Cook County citizens of the right to vote granted citizens of all other Illinois counties under Section 6 of Article VII of the 1970 Illinois Constitution.

As pointed out above, the Cook County home rule powers have been held to supersede prior state laws enacted by the General Assembly. (Appendix A at 3-7.) Further, for state statutory law to overturn an exercise of home rule powers (such as the liquor ordinance at issue here) requires such a law to be enacted by an extraordinary majority of three-fifths of the General Assembly. 1970 Ill. Const. Art. VII, § 6(g). Consequently, the practical effect of many home rule ordinances is that they either contradict or materially interfere with a statewide scheme of control, such as the Illinois Liquor Control Act, 43 Ill. Rev. Stat. §§ 94 *et seq.*, to the detriment of the constituents of the home rule entity. This, undoubtedly, is one reason why whenever Illinois voters have been given the choice to vote on the question of whether to bring home rule powers to their counties they have voted "No". But, again, only Cook County voters have been denied the right to vote on home rule which threatens them with deprivation of the protection of statewide laws of uniform application enacted by the majority of the

* The failure to apply the "compelling state interest" may have occurred because the court below followed the mistaken notion of defendants that all that was required was some sort of rational or reasonable basis. Plaintiffs did their best to dispel this erroneous notion. See Appendix C pp. 19-21.



General Assembly. Compare *Moore* v. *Ogilvie*, 394 U.S. 814 (1969).*

The issue raised herein is one of continuing federal importance because it concerns the question of whether state

* The Illinois Constitution was approved at a general statewide referendum which included Cook County. (Appendix A at 12.) However, this referendum did not affect the deprivation of the right to vote issue involved in this case because all non-Cook County voters are given the right to vote separately on the home rule issue. *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736 (1964). Further, the fact that Cook County voters can divest themselves of home rule by initiating a referendum does not cure the problem (Appendix A at 12-13) because there are significantly higher burdens placed on those seeking a referendum to discontinue home rule than on those seeking a referendum to adopt home rule.

While a referendum on adopting home rule may be obtained by a petition signed by two per cent or 500 of the registered voters in the county, *whichever is less*, a referendum on discontinuing home rule can be obtained only by a petition signed by five per cent of the registered voters of the county who voted in the last regular election held in the county at which county officers were elected. County Executive Act, 34 Ill. Rev. Stat. §§ 705, 714.

Since, however, the County Executive Act specifically excludes Cook County from its provisions (34 Ill. Rev. Stat. §§ 701 *et seq.*), a discontinuance referendum in Cook County is governed by Section 28—4 of the Illinois Election Code. (46 Ill. Rev. Stat. §§ 1—1 *et seq.*) That section provides that voters seeking a discontinuance referendum on home rule can do so only by obtaining petitions "signed by a number of qualified electors equal to or greater than 10% of the number who voted in the last general election in the governmental unit. . . ."

These are not, as the Illinois Supreme Court stated, "minor variances" (Appendix A at 13). Translated into the number of signatures required to obtain a referendum the variations become highly significant. While a referendum may be obtained on adopting home rule with 500 or, indeed, in some counties, even fewer signatures, a Cook County voter desiring a referendum on discontinuance of home rule must presently obtain 143,892 signatures on a petition seeking the referendum. (Based on 1,438,906 applications for ballot in the November 5, 1974 election, the last regular election held in Cook County.)

procedures for adopting new forms of local government must treat all voters equally under the Fourteenth Amendment. For example, in *Citizens for Community Action* v. *Ghezzi,* 386 F. Supp. 1 (Three Judge Dist. Ct., W.D.N.Y. 1974), the Court applied the standard urged here and consistently employed by this Court to invalidate a procedure for adopting home rule status, whereas the court below did not apply the standard.

This Court has not ruled on this important constitutional question. It is, however, of great importance to the conduct of local government throughout the United States and requires resolution by this Court.

## CONCLUSION.

Petitioners pray that this Court issue its Writ of Certiorari to the Supreme Court of Illinois to review the substantial federal questions raised herein.

Respectfully submitted,

PATRICK W. O'BRIEN
WAYNE W. WHALEN
STEVEN M. RASHER
THADDEUS J. MARCINIAK
231 South LaSalle Street
Chicago, Illinois 60604
*Attorneys for Petitioners*

*Of Counsel:*
LOUIS L. BIRO
221 N. LaSalle Street
Chicago, Illinois 60601

ROBERT G. PRESSMAN
188 W. Randolph Street
Chicago, Illinois 60601

MORTON SIEGEL
189 W. Madison Street
Chicago, Illinois 60602

MAYER, BROWN & PLATT
231 S. LaSalle Street
Chicago, Illinois 60604

Date: February 13, 1976

# APPENDIX

## APPENDIX A

MARY MULLIGAN *et al.*, Appellants, v. GEORGE W. DUNNE *et al.*, Appellees.

Opinion filed Sept. 26, 1975.—Rehearing denied Nov. 21, 1975.

MR. CHIEF JUSTICE UNDERWOOD delivered the opinion of the court:

This class action was instituted on June 10 of this year in the circuit court of Cook County by plaintiffs, who include manufacturers, wholesalers, retailers and consumers of alcoholic beverages, unions associated with the liquor industry and registered voters of Cook County, against defendants, County of Cook, George W. Dunne, president of the Board of Commissioners of Cook County and Edward J. Rosewell, treasurer and ex-officio collector of Cook County. They seek a declaratory judgment that the amended Cook County ordinance providing a tax on the retail sale of alcoholic beverages, which was originally enacted on May 5, 1975, violates section 6 of article VII of the Illinois Constitution of 1970 and the due process and equal protection clauses of the Illinois and United States constitutions.

The circuit court on June 30 stayed the effective date of the ordinance to August 1, and on July 23 granted in major part defendants' motion to dismiss, holding constitutional all provisions of the ordinance except section 4.1, which allowed the seizure and forfeiture without notice or hearing of alcoholic beverages on which the tax was not paid. We allowed plaintiffs' motion for direct appeal to this court pursuant to our Rule 302(b) (58 Ill.2d R.

302(b)), denying a motion to stay the effective date of the ordinance, which has been in effect since August 1, 1975. The circuit court's ruling that section 4.1 of the ordinance is unconstitutional is not challenged by defendants.

Section 1 of the ordinance imposes a tax "on the retail sale in Cook County of all alcoholic beverages * * * according to the following schedule: (a) Wines containing 14% or less alcohol by volume, a tax at the rate of 12 cents per gallon or the pro rata portion thereof. (b) Wines containing more than 14% alcohol by volume, a tax at the rate of 30 cents per gallon or the pro rata portion thereof. (c) Alcohol and spirits, a tax at the rate of $1 per gallon or the pro rata portion thereof. (d) Beer, a tax at the rate of 4 cents per gallon or the pro rata portion thereof." The ordinance states the tax is not a "tax upon the occupation of retail or wholesale alcoholic beverage dealers," but is to be borne by the consumer and any failure by retailers to include the tax in the sale price or any effort to otherwise absorb the tax is a violation of the ordinance. The tax is to be collected and paid to the Cook County collector by wholesalers who sell alcoholic beverages to retailers doing business in Cook County. The wholesalers are to collect the tax from the retailers, who in turn collect it from the consumer by including it in the sale price. Section 2 requires wholesalers to register with the Bureau of Administration of Cook County (the Bureau) and report their monthly sales to the county collector on forms prescribed by the Bureau within 45 days of the last day of the month for which return is due, remitting the tax due with each report. Section 3 authorizes the Bureau to promulgate reasonable rules, definitions and regulations in order to accomplish its duties under the ordinance and specifically provides that the "Bureau may appoint wholesale dealers of alcoholic beverages and any other person



within or without the County of Cook as agents for the tax herein levied." Section 3 also requires retailers doing business in Cook County to file with the Bureau a sworn inventory of all alcoholic beverages possessed on the effective date of the ordinance and to pay within 60 days to the county collector the tax due from the retail sale of such inventory unless the tax has already been collected and paid by a wholesaler. Section 4 allows the Bureau the right to inspect all books, records and reports of retailers and wholesalers. Section 5 prescribes penalties for violations of the ordinance and authorizes civil proceedings by the county to recover delinquent taxes. Section 6 declares that the tax is in addition to all other taxes imposed by Federal, State or local governments. Section 7 grants an exemption from the tax for sales of all alcoholic beverages to purchasers who are passengers on interstate carriers and for sales of wine "intended for use and used by any church or religious organization for sacramental purposes." Section 9 is a severability clause, declaring that the validity of the remainder of the ordinance shall not be affected by a holding that one or more of its provisions are unconstitutional.

Plaintiffs initially contend that passage of the ordinance exceeds the scope of the home-rule power to tax granted to Cook County by section 6(a) of article VII of the 1970 Constitution: "Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." They urge that the State's extensive taxation and regulation of the liquor industry (Ill. Rev. Stat. 1973, ch. 43, pars. 94 *et seq.*) demonstrate that the subject matter of the ordinance is one of statewide in-

terest which does not pertain to the government and affairs of Cook County within the meaning of section 6(a). We do not agree. The framers of the 1970 Constitution considered the power to tax as essential to effective home rule and intended that power to be broad. (See 7 Record of Proceedings, Sixth Illinois Constitutional Convention 1625-28, 1639-41 (hereinafter cited as Proceedings).) In its report to the Constitutional Convention, the Local Government Committee, which proposed the home-rule article, specifically included a local tax on liquor as one of its examples of valid home-rule ordinances. 7 Proceedings 1656.

Plaintiffs cite as authority several previous decisions of this court restricting to some degree the power of home-rule units, but we find them inapposite. In *Bridgman* v. *Korzen* (1972), 54 Ill.2d 74, Cook County had enacted an ordinance providing for the payment of real estate taxes in four installments, attempting to supersede the State statute which required payment in two installments. We there held that ordinance invalid because the collection of property taxes for other taxing bodies within the county was not a power or function of Cook County government which pertains to its government and affairs within the contemplation of section 6 of article VII. Unlike the ordinance which we there held invalid, the county's liquor tax ordinance concerns the government and affairs of no other taxing body or unit of government. In *City of Chicago* v. *Pollution Control Board* (1974), 59 Ill.2d 484, the city of Chicago contended that as a home-rule unit its municipal disposal sites and incinerators were not subject to the State Environmental Protection Act because the collection and disposal of garbage and waste is a governmental function within home-rule powers, the exercise of which had not been restricted by the General Assembly. While we indicated that a home-rule unit could legislate concurrently



with the General Assembly on environmental control, we said that any local legislation would have to conform to the minimum standards set by the General Assembly, for otherwise "it would be difficult if not impossible for the General Assembly to perform the mandate of maintaining a healthful environment imposed upon it by article XI of the 1970 Constitution." (59 Ill.2d 484, 490.) That case, involving the interrelationship between the home-rule provisions of the 1970 Constitution and the separate constitutional provision on the environment, is simply not analogous to the present case, which involves only an interpretation of the home-rule provisions of section 6 of article VII.

The only question then is whether the State has preempted the county's power to tax liquor by its legislation relating to the liquor industry. Section 6(g) of article VII of the 1970 Constitution allows the General Assembly to deny or limit the taxing power of a home-rule unit, but only by a law approved by three fifths of the members of each house. Since "An Act relating to alcoholic liquors" (commonly referred to as the Liquor Control Act or the Dramshop Act) was passed long before the implementation of the 1970 Constitution, it clearly is not an effort by the General Assembly to deny or limit the power of home-rule units to tax liquor. The Act, although admittedly an extensive regulation of the liquor industry, is not specifically declared as exclusive in regard to liquor taxation and in fact recognizes the local interest in liquor control by allowing local governments broad authority regarding closing hours and Sunday sales and licensing, even allowing them the right to completely prohibit the sale of intoxicating beverages. (Ill. Rev. Stat. 1973, ch. 43, pars. 110 through 114, 129, and 166 *et seq.*) Cook County's tax ordinance does not conflict with any portion of the Act, but

rather imposes a tax in addition to any imposed by the Act without any attempt to regulate those areas now regulated by the Act. We have held on several occasions that even an exercise of a home-rule power under section 6(a) which actually conflicts with a statute enacted prior to the adoption of the 1970 Constitution is nonetheless valid unless the power is restricted by a constitutional provision or appropriate legislation enacted subsequent to the 1970 Constitution. (*Peters* v. *City of Springfield* (1974), 57 Ill. 2d 142; *Clarke* v. *Village of Arlington Heights* (1974), 57 Ill.2d 50; *People ex rel. Hanrahan* v. *Beck* (1973), 54 Ill.2d 561; *Kanellos* v. *County of Cook* (1972), 53 Ill.2d 161.) Moreover, we have held that even if enacted subsequent to the Constitution, a statute which purports to restrict home-rule powers must be specific:

> "While section 6(g) of article VII authorizes the General Assembly, by a law approved by three fifths of the members of each house, to deny or limit the power of a home-rule unit, it does not follow that every statute relating to the powers of municipalities generally will, if adopted by a three-fifths vote, have a bearing upon the powers of those municipalities which are home-rule units. The powers which those units have received under section 6 of article VII of the constitution of 1970 are in addition to the powers heretofore or hereafter granted by the General Assembly to other municipalities. The kind of inadvertent restriction of the authority of home-rule units for which the plaintiff contends can be avoided if statutes that are intended to limit or deny home-rule powers contain an express statement to that effect. The statute before us contains no indication of a restrictive purpose, and we hold that it had no restrictive effect." (*Rozner* v. *Korshak* (1973), 55 Ill.2d 430, 435.)

Section 6(i) of article VII clearly provides for situations in which, as here, the State and home-rule units may act



concurrently: "Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive." Additionally, our holding is consistent with section 6(m) of article VII, which provides that "Powers and functions of home rule units shall be construed liberally." Accordingly, since the General Assembly has not by a three-fifths majority chosen to limit the power of home-rule units to tax liquor, Cook County has not exceeded its home-rule power under section 6(a) by the enactment of its liquor tax ordinance.

Alternatively, plaintiffs contend that, even if the taxation of alcoholic beverages is a proper concern of home-rule units, this particular tax is an occupation tax which under section 6(e) of article VII is beyond the power of home-rule units to enact unless authorized by the General Assembly: "A home rule unit shall have only the power that the General Assembly may provide by law * * * (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations." It is undisputed that the General Assembly has granted to home-rule units no such power to enact occupation taxes. Plaintiffs' argument is, however, directly contrary to our previous decision in *S. Bloom, Inc.* v. *Korshak* (1972), 52 Ill.2d 56, and must therefore be rejected. (See also *Jacobs* v. *City of Chicago* (1973), 53 Ill.2d 421.) In *Bloom,* a similar argument was presented regarding the city of Chicago's cigarette tax ordinance, which, like the present ordinance, specifically provided that the burden of the tax was to be borne by the consumer, but paid by the wholesaler, who would collect it from the retailer, who would in turn collect it from the consumer. We held that the city had not

passed an occupation tax, since the ordinance clearly placed the legal incidence of the tax on the consumer, not on the wholesaler or retailer who merely served as collection agents. Plaintiffs argue that *Bloom* is inapplicable because Cook County's liquor tax is distinguishable from Chicago's cigarette tax in that: (1) the liquor tax is far more complex, involving different tax rates on many sizes of bottles (and parts of bottles when served by the drink), causing the tax to often be in fractions of a cent and making it impossible to pass on to the consumer; (2) the tax must be paid on liquor which will never be sold at retail due to breakage, theft, *etc.*, but the ordinance makes no provision for refunds. In our judgment, however, the two taxes are not distinguishable. While it is true that this tax will be more difficult to pass on to the consumer than the simple 5 cents per package tax on cigarettes, the task is hardly impossible. Nor is the fact that the ordinance makes no explicit provision for refunds of consequence. The tax is clearly levied only on retail sales, and forms already issued by the Bureau of Administration pursuant to its authority to enact rules and regulations provide a means of claiming a refund of tax paid on liquor which is never sold at retail. Consequently, under *Bloom,* the county liquor tax is not an occupation tax requiring approval of the General Assembly.

Plaintiffs' due process and equal protection arguments can be summarized as follows: (1) the alleged imposition of the tax on consumers is unrelated to the method of collection, which computes the tax in the first instance upon wholesale transactions, all of which will not result in retail sales, yet the ordinance makes no provision for refunds; (2) a similar argument is raised in relation to the initial floor tax to be paid by retailers on their inventories on hand on the date the ordinance becomes effective; (3)



since the liquor on which the tax has been paid may not be sold at retail for many months, wholesalers and retailers are required to remit their own funds to pay the tax well in advance of the event the ordinance purports to tax; (4) the delegation to the Bureau of Administration of authority to pass rules and regulations is an unlawful delegation of legislative power to an administration body and the forms already adopted by the Bureau are invalid as they have effectively amended the ordinance. Although the implementation of this ordinance by the county and its Bureau of Administration has been criticized as creating confusion for those in the liquor industry, we do not believe the problems are of sufficient magnitude to invalidate the ordinance on due process or equal protection grounds.

As previously noted, there is little to distinguish this collection system from the one we approved in *Bloom* (see also *Heyman* v. *Mahin* (1971), 49 Ill.2d 284, and *Jacobs* v. *City of Chicago* (1973), 53 Ill.2d 421), and the failure to specifically provide for refunds in the ordinance, even assuming the necessity therefor, is not fatal since forms issued by the Bureau of Administration allow refunds and apparently will insure that tax is paid only as to those wholesale transactions which actually result in retail sales. Contrary to plaintiffs' contention, these forms do not amend the ordinance but merely implement section 1 of the ordinance, imposing the tax only on the retail sales of alcoholic beverages. Nor do we agree that section 3 of the ordinance, allowing the Bureau to "prescribe reasonable rules, definitions and regulations to carry out the duties imposed upon it by this Ordinance," is an unlawful delegation of legislative power. "Absolute criteria whereby every detail necessary in the enforcement of a law is anticipated need not be set forth in the ordinance itself. While a legislative body cannot delegate its general power

to determine what the law shall be, it may delegate to others the authority to do those things which it might properly do itself but cannot do as understandingly or advantageously." (*Brown* v. *City of Chicago* (1969), 42 Ill.2d 501, 506.) In our judgment, this ordinance "contains sufficient controls and standards so that there is no unlawful delegation of legislative authority." (*Paper Supply Co.* v. *City of Chicago* (1974), 57 Ill.2d 553, 579; see also *Jacobs* and *Bloom*.) We note too that the Bureau has not exceeded its delegated authority by requiring, through the forms, that retailers remit the tax on purchases from wholesalers located outside Cook County who do not remit the tax. Although the basic collection system prescribed by section 1 of the ordinance requires wholesalers to remit the tax, section 3 states that the "Bureau may appoint wholesale dealers * * * and any other person within or without the County of Cook as agents for the tax herein levied." Not only is the requirement by the Bureau that retailers remit the tax in some instances therefore clearly authorized by section 3, it is consistent with the intent of the ordinance to tax all retail sales except those specifically exempted in section 7.

We cannot agree that plaintiffs' property is taken without due process because they must pay the tax out of their own funds well in advance of the taxable event. In *Sherman-Reynolds, Inc.* v. *Mahin* (1970), 47 Ill.2d 323, plaintiff employers alleged a denial of due process because the withholding provisions of the Illinois Income Tax (Ill. Rev. Stat. 1969, ch. 120, pars. 7-701 through 7-707) did not allow them compensation for the expenses incurred in collecting the tax. The benefits of the present collection system are similar to those of the income tax withholding system: "Chances for complete evasion of the tax are minimized, delinquencies in collections are reduced, and the costs of



enforcement when either occur are obviated. In addition, taxpayers are put on a current basis and tax monies become available to the goverrnment at intervals more consonant with its month-to-month needs, perhaps forestalling deficit spending or the need to raise money in anticipation of future tax income." (47 Ill.2d 323, 327.) We upheld the income tax withholding system, noting that "Regulations imposed by a State in the exercise of its police power, when reasonable and adapted to the scope and object sought to be accomplished, are not rendered unconstitutional even though private property may be injured, interfered with, or damaged without the payment of compensation." (47 Ill.2d 323, 328.) In our judgment, the system utilized to collect Cook County's liquor tax is "reasonable and adapted to the scope and object sought to be accomplished" and is thus not unconstitutional even though plaintiffs may conceivably suffer some minor damage through loss of the use of their money. The floor tax on existing inventories is not due from retailers until 60 days after the effective date of the ordinance, and the tax due on wholesale transactions is not due until 45 days after the close of the taxable month. Even if liquor inventories do turn over slowly as alleged, it would seem obvious that at least in some instances inventories will turn over rapidly enough that plaintiffs will have the use of tax money well before the collection date, offsetting losses that might occur as a result of slower moving inventory. Moreover, plaintiffs, unlike the employers in *Sherman-Reynolds*, will receive a commission of 1% of the tax due on the initial inventory and .5% of the tax due thereafter to cover the costs of collection. Finally, we note that although this ordinance, like many others, may be susceptible of misapplication unless properly implemented by an administrative agency, that fact does not necessarily render it unconstitutional. *Paper Supply Co.* v. *City of Chicago* (1974), 57 Ill.2d 553, 581; *Jacobs* v. *City of Chicago* (1973), 53 Ill.2d 421, 426-27; *Stein* v. *Howlett* (1972), 52 Ill.2d 570, 580.

Plaintiffs next contend that section 6 of article VII deprives plaintiff Mulligan, a registered voter of Cook County, and the class she represents of the right to vote as guaranteed by the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. Section 6(a) of article VII of the 1970 Illinois Constitution provides that a "County which has a chief executive officer elected by the electors of the county and any municipality which had [sic: has] a population of more than 25,000 are home rule units." Section 4 of article VII provides that "Any county may elect a chief executive officer as provided by law," except that the "President of the Cook County Board shall be elected from the County at large and shall be the chief executive officer of the County." As a result, Cook County became a home-rule county when the Constitution became effective, while voters in all other counties in the State may adopt or reject home rule by their decision on whether to elect a chief executive officer. The voters of Cook County, however, have hardly suffered a deprivation of their right to vote. Not only were they able to vote on the adoption of the 1970 Constitution, which was approved overwhelmingly in Cook County, they also have the constitutional right to choose to divest themselves of home rule: "A home rule unit by referendum may elect not to be a home rule unit" (Ill. Const. (1970), art. VII, sec. 6(b)).

It is clear that the framers considered home rule essential only in Cook County and larger municipalities where "[d]ense concentrations of population and industry call for the creative use of flexible governmental power to achieve and maintain order, social justice and a satisfactory quality of life." (7 Proceedings 1629; see, generally, 7 Proceedings 1628-36.) Although home rule is initially granted Cook County and the larger municipalities because



they need the greater local power afforded by home rule, they can at any time elect to do away with home rule, while the other counties and smaller municipalities, whose need for home rule power is not so crucial, nevertheless have the option of choosing home rule at any time the voters feel the need for broader power at the local level. Such a system, including implementing legislation establishing minor variances in the percentages of petitioning voters necessary to referenda on questions of home rule abandonment in Cook, as contrasted to other counties (Ill. Rev. Stat. 1973, ch. 46, par. 28-4; Ill. Rev. Stat. 1973, ch. 34, par. 701 *et seq.*), in our judgment neither impermissibly affects the right to vote of any citizen of this State nor creates a classification that offends the traditional requirements of Federal or State equal protection. *In re Estate of Karas* (1975), 61 Ill.2d 40, 47-48; *McRoberts* v. *Adams* (1975), 60 Ill.2d 458.

Plaintiffs next assert that section 1 of the ordinance is so impermissibly vague that it offends due process standards. The portion of section 1 alleged to be vague states: "It shall be deemed a violation of this Ordinance for a retail alcoholic beverage dealer to fail to include the tax imposed herein to the sale price of the alcoholic beverage or to otherwise absorb such tax." Plaintiffs interpret this sentence to mean that retailers must absorb the tax in their sale price, while other provisions in the ordinance require just the opposite, that the tax be imposed upon and paid by the consumer. Plaintiffs' interpretation, in our judgment, is simply contrary to the plain meaning of section 1 which, either alone or in conjunction with the remainder of the ordinance, clearly requires that the retailer not absorb the tax by any means but pass it on to the consumer by including the amount of the tax in the sale price.

Plaintiffs' final contention is that Cook County cannot, under its home-rule powers, require out-of-county wholesalers to collect the tax. They initially urge that counties cannot exercise extraterritorial powers, citing numerous cases such as *City of Rockford* v. *Hey* (1937), 366 Ill. 526, holding that municipal corporations have no authority beyond their borders. Those cases are, however, bottomed primarily upon the absence of statutory authorization for such action, and we regard them as inapposite. Defendants argue that we have already approved such extraterritorial home-rule power in *Bloom* since the cigarette tax ordinance there held to be constitutional required collection by out-of-city wholesalers selling cigarettes to Chicago retailers. However, the extraterritorial issue was neither raised by the parties in *Bloom* nor discussed by this court, and that case cannot be regarded as resolving this issue. Nor do we believe that *City of Carbondale* v. *Van Natta* (1975), 61 Ill.2d 483, adopted this term, is dispositive of the question. That case indicates that the proceedings of the 1970 constitutional convention demonstrated an intention not to confer extraterritorial sovereign or governmental power directly on home-rule units, and that the "intendment shown is that whatever extraterritorial governmental powers home-rule units may exercise were to be granted by the legislature."

But the crucial inquiry is not whether home-rule units have extraterritorial powers—rather, it is whether any local unit of government is exercising its taxing power extraterritorially by collecting a tax from sellers located outside the boundaries of the local unit which do business within those boundaries. We think it is not. An ordinance is presumed valid, and the burden of establishing invalidity rests upon those asserting it; that burden has not been met in this case. Perhaps factual situations may be hy-



pothesized in which enforcement of this ordinance as to out-of-county wholesalers would raise substantial constitutional questions. Those facts are not presented here, and we may not assume that enforcement of the ordinance will be attempted under circumstances which would constitute an extraterritorial exercise of taxing power. We add only that it should be clear that no modification of the rule set forth in *Van Natta* is intended by our decision of this issue.

The judgment of the circuit court of Cook County is accordingly affirmed.

*Judgment affirmed.*

## APPENDIX B

The Illinois Constitution of 1970 provides in part:

§ 4. *County officers*

(a) Any county may elect a chief executive officer as provided by law. He shall have those duties and powers provided by law and those provided by county ordinance.

(b) The President of the Cook County Board shall be elected from the County at large and shall be the chief executive officer of the County. If authorized by county ordinance, a person seeking election as President of the Cook County Board may also seek election as a member of the Board.

* * *

§ 6. *Powers of Home Rule Units*

(a) A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

(b) A home rule unit by referendum may elect not to be a home rule unit.

(c) If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction.

(d) A home rule unit does not have the power (1) to incur debt payable from ad valorem property tax receipts



maturing more than 40 years from the time it is incurred or (2) to define and provide for the punishment of a felony.

(e) A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months or (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.

(f) A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law, except that the form of government of Cook County shall be subject to the provisions of Section 3 of this Article. A home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law. A home rule county shall have the power to provide for its officers, their manner of selection and terms of office in the manner set forth in Section 4 of this Article.

(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (*l*) of this Section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (*l*) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does

not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

(j) The General Assembly may limit by law the amount of debt which home rule counties may incur and may limit by law approved by three-fifths of the members elected to each house the amount of debt, other than debt payable from ad valorem property tax receipts, which home rule municipalities may incur.

(k) The General Assembly may limit by law the amount and require referendum approval of debt to be incurred by home rule municipalities, payable from ad valorem property tax receipts, only in excess of the following percentages of the assessed value of its taxable property: (1) if its population is 500,000 or more, an aggregate of three percent; (2) if its population is more than 25,000 and less than 500,000, an aggregate of one percent; and (3) if its population is 25,000 or less, an aggregate of one-half percent. Indebtedness which is outstanding on the effective date of this Constitution or which is thereafter approved by referendum or assumed from another unit of local government shall not be included in the foregoing percentage amounts.

(*l*) The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

(m) Powers and functions of home rule units shall be construed liberally.



## APPENDIX C

---

**Plaintiffs' Opening Brief (pp. 55-57):**

> "C. Because Mary Mulligan and Her Class Are Denied the Right to Vote, Defendant Must Demonstrate that a Compelling State Interest is Served by This Denial.
>
> • • •
>
> It is clear, then, that having denied Plaintiff Mulligan and her class the right to vote, Defendants must show that this exclusion serves a compelling state interest. Plaintiffs submit that no such showing will be possible."

**Defendants' Answering Brief (pp. 44-45):**

> "However, the defendants assert that the statutory scheme is neither arbitrary, invidious, irrational, nor inherently suspect. Rather, as indicated below, the classification is most reasonably designed to serve an important state interest, and does not warrant invalidation by this court. Indeed, the law is well-settled that a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970)."

**Plaintiffs' Reply Brief (pp. 14-15):**

> "DEFENDANTS HAVE NOT DEMONSTRATED A COMPELLING STATE INTEREST FOR THE DEPRIVATION OF THE RIGHT TO VOTE IN SECTION 6 OF ARTICLE VII OF THE 1970 ILLINOIS CONSTITUTION.
>
> A. The Applicable Test in Cases Involving the Franchise is Whether the Classification is Necessary to Serve a Compelling State Interest.

Defendants have completely misunderstood the aplicable test in cases involving the franchise. (Defendants' Brief, pp. 44-46). Cases such as *McGowan* v. *Maryland,* 366 U.S. 420 (1961), and *Dandridge* v. *Williams,* 397 U.S. 471 (1970), are inapplicable, because the test is not whether 'any state of facts reasonably may be conceived' to justify the discrimination. (Defendants' Brief, p. 45). As the Supreme Court has frequently recognized, in cases involving a fundamental right such as the franchise:

> '[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.'

*Kramer* v. *Union Free School District,* 395 U.S. 621, 627 (1969). See also *Dunn* v. *Blumstein,* 405 U.S. 330, 337 (1972). In *Hill* v. *Stone,* ..... U.S. ....., 95 S. Ct. 1637, 1643 (1975), the Supreme Court reiterated the standard enunciated in *Kramer*:

> 'The basic principle expressed in these cases is that so long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest. See *Kramer, supra,* 395 U.S., at 626, 627, 89 S.Ct. at 1889; *Cipriano, supra,* 395 U.S., at 704, 89 S.Ct. at 1899.'

Defendants argue that it is neither arbitrary nor irrational to require a chief executive officer in a county which is to possess home rule powers. (Defendants' Brief, pp. 56-58). Of course mere rationality is not the test. *Kramer, supra,* at 633. Moreover, the necessity for a chief executive officer in a home rule county is irrelevant to the claim of Mary Mulligan and her class. The invidious discrimination worked by Section 6 of Article VII does not concern the appropriateness



of a particular form of governmental organization for home rule counties. The deprivation suffered by Cook County voters is the loss of the right to determine whether their county government should become a home rule unit at all.

Defendants have demonstrated no compelling state interest for this denial of the franchise. In fact, they have not advanced any reason whatsoever for the total disenfranchisement of Cook County voters on the issue of home rule.''

**Plaintiffs' Petition for Rehearing (pp. 2, 3):**

''The opinion is inconsistent with the United States Supreme Court's interpretation of the Constition. That Court has consistently held that in cases involving a fundamental right such as the franchise:

> '[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denied the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.'

*Kramer* v. *Union Free School District,* 395 U.S. 621, 627 (1969). See also *Dunn* v. *Blumstein,* 405 U.S. 330, 337 (1972). In *Hill* v. *Stone,* 421 U.S. 289, 297 (1975), the Supreme Court reiterated the standard enunciated in *Kramer*:

> 'The basic principle expressed in these cases is that so long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest. See *Kramer, supra,* 395 U.S., at 626, 627, 89 S.Ct. at 1889; *Cipriano, supra,* 395 U.S., at 704, 89 S.Ct. 1899.

Supreme Court, U. S.
FILED
FEB 23 1976
MICHAEL RODAK, JR., CLERK

No. 75-1142

# In the Supreme Court of the United States

OCTOBER TERM, 1975

---

**MARY MULLIGAN**, an individual, et al.,

*Petitioners,*

vs.

**GEORGE W. DUNNE**, et al.,

*Respondents.*

---

## MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

---

MICHAEL R. BERZ
160 North LaSalle Street
Chicago, Illinois 60601

SORG/CHICAGO U.S.A.

# In the
# Supreme Court of the United States

OCTOBER TERM, 1975

---

## NO.

---

**MARY MULLIGAN**, an individual, et al.,

*Petitioners,*

vs.

**GEORGE W. DUNNE**, et al.,

*Respondents.*

---

## MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

---

Now comes the Illinois Liquor Control Commission through Michael R. Berz, its Chairman, and moves that this Honorable Court grant its Motion For Leave To File An Amicus Curiae Brief. This Motion is being submitted pursuant to Supreme Court Rule 42, Sections 1 and 3, upon Motion, because of the absence of consent of a party, George W. Dunne, Respondent.

## I.

## NATURE OF APPLICANT'S INTEREST

The Illinois Liquor Control Commission is the only agency in the State of Illinois which has the duties and powers pursuant to Chapter 43, Sections 94 et seq. Illinois Revised Statutes (1975) Dram Shop Act, to regulate and enforce the laws relating to the distribution of alcoholic beverages for the entire State.

Within the context of administering the laws relating to the distribution of alcoholic liquor, Secs. 120a, 158 and 159 which relate to taxation on the sales and distribution of alcoholic liquor, are incorporated by reference into the Dram Shop Act giving the Illinois Liquor Control Commission the powers and duties to hold administrative hearings in this area to aid the State Department of Revenue in collecting excise and retailers occupational taxes.

## II.

## FACTS AND QUESTIONS OF LAW THAT WILL NOT BE ADEQUATELY PRESENTED BY THE PARTIES

### The Twenty-First Amendment to the Constitution of The United States

Neither the Illinois Supreme Court decision from which the Writ of Certiorari is taken, *Mary Mulligan, et al., Appellants* v. *George W. Dunne, et al., Appellees,* 61 Ill. 2d 544, 338 N.E.2d 6 (1975) nor the Petitioner's Petition for Writ of Certiorari deal in any effective manner with the impact upon the Twenty-First Amendment to the United States Constitution and the consequenting impact upon the State which the Illinois Supreme Court decision, supra, has.

The focal point of argument between the parties relating to the power of Cook County to adopt the ordinance in



question is an inquiry into whether or not the provisions for County Home Rule Powers found in Article VII, Section 6 of the 1970 Illinois Constitution gives Cook County this power. The Illinois Liquor Control Commission's position is that before an inquiry can be made into the State Constitution's provisions, that an analysis must first be made of the Twenty-first Amendment to the United States Constitution because this is the Source of State Power to regulate the liquor industry.

The State, pursuant to the Twenty-First Amendment of the United States Constitution, has the exclusive power to regulate all aspects of the liquor industry, including the incidence of taxation. *California* v. *LaRue,* 409 U.S. 109 (1972); *State Board* v. *Youngs Market Co.,* 299 U.S. 59 (1936).

The adoption of the Cook County liquor tax ordinance resulted in a disparity in taxation on liquor within the State of Illinois, since Cook County is the only county which has such a tax. This has induced retailers situated within Cook County who own other retail establishments outside of Cook County to transfer their products from the site outside of Cook County into Cook County to avoid the incidence of this tax, thereby violating Rule 25 promulgated by the Illinois Liquor Control Commission. The imposition of the Cook County tax has also induced both retailers and wholesalers to violate Section 126 of the Dram Shop Act—"Registration of trade marks, etc., sale within geographical area, delivery to authorized persons." This Section is intended, among other things, to aid the Illinois Liquor Control Commission in knowing the kind and quantities of alcoholic liquor authorized to be distributed by a wholesaler, in order to ensure competitiveness and an orderly collection of taxes. The inducement

to violate this Section by retailers purchasing from unauthorized wholesalers outside Cook County and wholesalers selling to retailers outside of Cook County is obvious.

### Applicability of Fourteenth Amendment

The Fourteenth Amendment requires agencies of State Government to apply State laws consistently with applicability to all individuals similarly situated. *Shoot* v. *Illinois Liquor Control Commission,* 30 Ill. 2d 570 (1964).

Even though the Illinois Liquor Control Commission is not the agency which collects the Cook County tax, it is charged with the responsibility to cooperate with all subdivisions of this State—by exchanging data, participating in joint raids and forwarding licensing information with the Cook County Board.

In summary, it can be seen that the Applicant has a substantial interest in ensuring that the applicable provision of the United States Constitution which protects the State's interest be enforced.

## CONCLUSION

Petitioners pray that this Court issue its Writ of Certiorari to the Supreme Court of Illinois to review the substantial federal questions raised herein.

Respectfully submitted,

MICHAEL R. BERZ
160 North LaSalle Street
Chicago, Illinois 60601